1949

Arnie R. Green v. The Lang Company, Inc. et al : Brief of Respondents

Utah Supreme Court

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7262

In the Supreme Court

OF THE

State of Utah

ARNIE R. GREEN,
Plaintiff and Appellant,

— VS. —

THE LANG COMPANY, INC., a Corporation,
LEONARD CHIPMAN LIVESTOCK COMPANY, a Corporation,
JULION CLAWSON, Sr., and
JULION CLAWSON, Jr.,
Defendants and Respondents.

Case No. 7262

BRIEF OF RESPONDENTS

AN APPEAL FROM THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

HONORABLE A. H. ELLETT, *Judge*

ROBERTS & ROBERTS
Attorneys for Defendants and Respondents LEONARD CHIPMAN LIVESTOCK COMPANY, a Corporation, JULION CLAWSON, SR., and JULION CLAWSON, JR.

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STATEMENT OF THE CASE

This is a case in which it has been judicially determined that the plaintiff, by reason of certain personal injuries, has been damaged in the sum of $3,030.00; but the plaintiff is seeking to recover for those damages the sum of $4280.00.

The plaintiff brought this action against the Lang Company, Inc., a corporation, Leonard Chipman Livestock Company, a corporation, Julion Clawson, Sr., and Julion

Clawson, Jr., and in his amended complaint alleged that his injuries were due to the carelessness and negligence of the defendants as alleged in paragraph 7 of his said amended complaint (R. 14).

The defendants Leonard Chipman Livestock Company and the two Clawsons, by answer, denied their own negligence, but did not deny the negligence of the Lang Company, the other defendant, and did not deny that the negligence of the Lang Company proximately caused the injuries to the plaintiff. Hence, as between these defendants and the plaintiff there was no issue as to the negligence of the Lang Company or as to the fact that such negligence proximately caused injuries to the plaintiff.

On the 7th day of June, 1948, the day before this case came to trial, the plaintiff and the Lang Company entered into a covenant not to sue, wherein it was recited that there had been some claim of liability on the part of the Lang Company; that, therefore, in consideration of the sum of $1,250, the plaintiff promised and agreed not to sue the Lang Company on any claim or claims of any description for or on account of any injuries received by plaintiff in the accident wherein plaintiff was injured by reason of a tire and wheel falling off the truck of these defendants. Plaintiff expressly reserved its rights against the defendant Livestock Company and the two Clawsons.

Pursuant to this agreement, the Court entered an order dismissing the case as against the Lang Company (R. 34).

This cause proceeded to trial, with the Lang Company

eliminated as a party. At the end of the presentation of evidence, the covenant not to sue was submitted in evidence by the parties hereto as Exhibit H (R. 114). The Trial Court found the issues in favor of the plaintiff and against these defendants and found that the plaintiff had been damaged in the sum of $3,030.00. (See paragraph 9, Findings of Fact and Conclusions of Law, R. 48). The Trial Court further found that the plaintiff had received from the Lang Company the sum of $1,250.00 in consideration for which plaintiff agreed not to sue or prosecute the Lang Company for any injuries received in the accident involved in this cause of action. The Court thereupon deducted the $1,250.00 so received by the plaintiff and entered judgment against the defendants Livestock Company and the two Clawsons in the sum of $1780.00.

The plaintiff in this Court contends that the defendant Lang Company and the defendants Livestock Company and the two Clawsons were not joint *tort feasors,* that the Lang Company was in no way responsible for the injuries suffered by the plaintiff, and that, therefore, judgment should be entered against the latter defendants for the entire amount of plaintiff's damages, and upon some theory left unstated, plaintiff is entitled to pocket $1,250.00 in addition thereto.

Plaintiff's statement of the facts of the case is generally correct and we will make such further statement of facts as we deem necessary under each of the points we rely upon.

POINTS INVOLVED

To sustain the judgment as rendered by the Trial Court,

the defendants Leonard Chipman Livestock Company, Julion Clawson, Sr., and Julion Clawson, Jr., rely upon and present in opposition to plaintiff's contention, the following propositions:

I.

Where an injured person files suit against two or more persons alleging that their negligence caused his injuries, any settlement made by the injured person with one of the defendants will be deducted from the amount of damages suffered by him, even though the defendant released was not in fact liable.

II.

The pleadings and proof in this case support the finding of the Trial Court that the Lang Company was negligent and that its negligence was a proximate cause of plaintiff's injuries, and that, hence, it was a joint *tort feasor*.

ARGUMENT

Point I.

WHERE AN INJURED PERSON FILES SUIT AGAINST TWO OR MORE PERSONS ALLEGING THAT THEIR NEGLIGENCE CAUSED HIS INJURIES, ANY SETTLEMENT MADE BY THE INJURED PERSON WITH ONE OF THE DEFENDANTS WILL BE DEDUCTED FROM THE AMOUNT OF DAMAGES SUFFERED BY HIM, EVEN THOUGH THE DEFENDANT RELEASED WAS NOT IN FACT LIABLE.

Plaintiff should be entitled to but one satisfaction for the damages suffered by him. A holding contrary to this proposition would be inequitable and unjust and would permit an injured person to make money out of any injury he may suffer by fiiling suit or threatening to file suit against various persons and thereby getting them to pay money for injuries suffered, even though there was no liability upon their part.

It is to be noted that it is not a contention of these defendants, the Livestock Company and the two Clawsons, that the payment of $1,250.00 to the plaintiff by the Lang Company discharges these defendants. Their contention is that the payment by the Lang Company, which was made a party to this suit, is a *pro tanto* discharge of these defendants, who are then liable only for the balance of the damages suffered by the plaintiff. There is no discussion of this proposition in Appellant's Brief, and we submit that the law sustains the proposition here asserted by these defendants.

Section 47-0-3, *Utah Code Annotated,* 1943, provides as follows:

> "The amount or value of any consideration received by the obligee from one or more of several obligors, or from one or more of joint or of joint and several obligors, in whole or in partial satisfaction of their obligations shall be credited to the extent of the amount received on the obligation by all co-obligors to whom the obligor or obligors giving the consideration did not stand in the relation of a surety."

By Section 47-0-1 the obligor includes a person liable

for a tort; obligee includes a person having a right based on tort.

Under this statute no distinction is made between releases and covenants not to sue. At common law it was early held that a discharge of one of two or more joint *tort feasors* by release effected a discharge of the other joint *tort feasors*. To lessen the supposed harshness of this rule the courts began holding that where the injured person entered into a covenant not to sue with one of two or more *tort feasors*, such covenant not to sue would not result in a release or discharge of the other joint *tort feasors*. However, it is well established at common law that payments made on account of such injuries, pursuant to the terms of a covenant not to sue, are considered as *pro tanto* satisfaction of damages recoverable against the other joint *tort feasors*. (See annotation at 104 *A.L.R.* 931, the title of which is "Amount Paid by One Alleged Joint *Tort Feasor* in Consideration of a Covenant not to Sue, as *pro tanto* Satisfaction of Damages Recoverable against Other Joint *Tort Feasors*."

45 *Am. Jur.* 677, *Release Sec.* 4 states the rule as follows:

> "An injured person can have but one satisfaction for his injuries; and therefore the amount paid by the *tort feasor*, in whose favor the covenant not to sue was given, will be regarded as satisfaction *pro tanto* as to the joint *tort feasors*."

See also *Daniels v. Celeste*, 303 Mass. 148, 21 N. E. 2d, 1, 128 A.L.R. 682; *Laurezi v. Vranizan*, 25 Cal. 2d 806, 155 P. 2d 633 (1945); *McKenna v. Austin*, 134 F. 2d 659

(1943); 4 Restatement of the Law of Torts, Section 885.

Plaintiff seeks to avoid the application to this case of the foregoing statute, and authorities, by a contention that the Lang Company was in fact not liable to plaintiff at any time, although plaintiff alleged under oath that the Lang Company was liable for such injuries, and although based upon that claim of liability, plaintiff pocketed the sum of $1,250.00 paid to him by the Lang Company.

The courts have not looked with favor upon such contention, and in over-ruling such contention, have asserted that an injured person is entitled to but one satisfaction; that it would be inequitable for a person to receive for his injuries more compensation than the damages suffered, and that such injured person will be estopped from asserting that a person who paid him compensation for injuries was not in fact liable therefor.

In *Jacobsen v. Woerner,* 149 Kan. 598, 89 P. 2d 24 (1939), plaintiff brought an action for personal injuries. Plaintiff was a passenger in a bus of the Cardinal Stage Lines. Defendant's truck was moving on the same sighway as the bus, in the opposite direction, and in passing another car went on to the left side of the highway, striking the Stage Lines bus and injuring plaintiff. The plaintiff, in consideration of $250.00 paid by the Stage Lines, entered into a covenant not to sue the Stage Lines. The covenant provided that the Stage Lines denied any negligence, and that it was desired by the parties to avoid litigation and the expenses thereof, and that they desired to set at rest the

differences between them. Plaintiff saved all rights against all others.

The jury found that the Stage Lines was not guilty of negligence. The verdict was for the plaintiff against the defendant, and the trial court refused to allow any reduction for the amount paid to plaintiff under the covenant not to sue. This was held error.

The court stated that an injured party could receive but one satisfaction for the same injury; that a release of one joint *tort feasor* releases all, and that a covenant not to sue one joint *tort feasor* does not release others.

After quoting from a number of cases, the Kansas Supreme Court concludes:

> "When a right of action is once satisfied, it ceases to exist. If part satisfaction has already been obtained, further recovery can only be had of a sum sufficient to accomplish satisfaction. It is not necessary that the party making payment in partial satisfaction was in fact liable; anything received on account of the injury inures to the benefit of all and operates as a payment *pro tanto*. The plaintiff is entitled to only one satisfaction from whatever source it may come."

The court remanded the case with instructions to deduct the $250.00 from the judgment entered.

Another leading case on this subject is the case of *Tompkins v. Clay-street Hill R. Co.*, 66 Cal. 163, 4 P. 1165 (1884). In that case plaintiff commenced an action for personal injuries resulting from a collision of the cars of the Clay-street Hill Company and the Sutter-street Company,

plaintiff being a passenger on the Sutter car. The complaint alleged that both companies were negligent. The Sutter Company paid the plaintiff and received a release. The Trial Court instructed the jury that if both companies were jointly at fault, then the verdict must be for the defendant, because the payment to the Sutter Company would release the defendant Company; but that if only the defendant Company was at fault, then the verdict must be for the plaintiff. This instruction was held to be error and the Court stated:

> "It is urged by counsel for appellee that the rule only applies where the money is paid by, or the release executed to, one who is himself actually guilty of the wrong or negligence. If it be conceded that a release to, or receipt of money in alleged satisfaction from, one not himself a trespasser, will not discharge those actually guilty, the question still remains: Can the plaintiff, under the circumstances, be permitted to deny that the Sutter-street Railroad Company was guilty of negligence directly contributing to the injuries by her received? Reading the release and stipulation in the record, it is plain the $550.00 was paid in settlement of the action pending, in so far as the cause of action alleged constituted a claim against the Sutter-street Company. The compromise of an asserted claim does not necessarily involve an admission on the part of him against whom the claim is asserted that the claim is well founded. But one who, having commenced an action against another, has received money in consideration that the action shall be dismissed, or that any judgment he may recover shall not be enforced, ought not to be permitted to deny that he received the money in satisfaction of a valid demand. The defendant paying the money may subsequently say: 'I did not and do not admit that I ought to have paid anything;

> I was willing to buy my peace.' But the other party ought not to be allowed to deny that he had any right to the money, the payment of which he had induced under pain of the prosecution of an action already commenced. He should not be permitted to say, with any beneficial result to himself, 'I pursued the defendant *falso clamore*, and I took his money by way of settlement of a pending action in which I never could have recovered.' Shall it be said that plaintiff has not received compensation for the injuries she sustained, because she did not choose affirmatively to prove that the negligence of the party from whom she received the money contributed to the injuries? The plaintiff must be held to have received from the Sutter-street Company satisfaction for the very same injuries for which she obtained a judgment against the appellant."

A later California case considered this same proposition, *Hawber v. Raley,* 92 Cal App. 701, 268 P. 943 (1928). In that case the plaintiff was injured in an automobile collision. She was riding in an auto owned by Mrs. Emery and driven by Mr. Emery. The other automobile was owned by the defendant and was driven by his son. The plaintiff, in consideration of $380.27, released Mrs. Emery. The agreement provided that it was not to be construed as an admission of liability by Mrs. Emery. The jury found that the negligence of neither Mr. nor Mrs. Emery proximately caused the negligence. The plaintiff contended that because of this finding the rule as to release of one joint *tort feasor* was not applicable. The Court held that it was immaterial that the Emerys were not liable and stated:

> "Upon this latter question the authorities are

> apparently not agreed, but, whatever may be the law elsewhere, the rule seems to obtain in this state that irrespective of the source from whom the compensation for the injury is accepted, the payment will operate as a satisfaction, which in equity and good conscience does not permit the party so compensated to recover again for the same injury, the ground of the rule being that the validity of the release is in no way dependent upon the validity of the claim, and therefore it is immaterial whether the person from whom satisfaction came was or was not legally liable * * * ; nor does it make any difference however small the compensation thus paid may have been * * * . The bar arises not from any particular form that the proceeding assumes, but from the fact that the injured party has actually received satisfaction or what the law deems is the equivalent."

The Court further stated:

> " * * * the application of the rule is based upon the fundamental fact that, where there is a single injury, there is but one cause of action, indivisible and inseparable, for which both in law and good conscience there can be but one satisfaction."

Later California cases have recognized and followed the same rule. See *Drumm v. Hart,* 136 Cal. App. 12, 27 P. 2d 945 (1933); *Blackburn v. McCoy,* 1 Cal. App. 2d 64, 37 P. 2d 153 (1934); *Leff v. Knewbow,* 47 Cal. App. 2d 360, 117 P. 2d 922 (1941).

In *Snyder v. Mutual Telephone Company* 135 Iowa 215 112 N.W. 776, 14 L.R.A (N.S.) 321 (1907), plaintiff's decedent was killed by coming in contact with a wire charged with electricity. Plaintiff accepted $1,200.00 from the Des Moines Electric Light Company in full settlement of any

claim against that Company; she then filed suit against the defendant Telephone Company. The jury was instructed that if the Light Company and the defendant were joint wrong doers, then their verdict must be for the defendant; but that if the Light Company was not a wrong doer, then the verdict must be for the plaintiff. The verdict was rendered in favor of the plaintiff and on appeal the foregoing instruction was held erroneous. The Court stated:

> "The vice of this instruction is that it requires the defendant to show as an affirmative fact, in order to sustain the settlement pleaded by it, that the light company was, as a matter of law and fact, liable for the injury. In other words, it requires the defendant to make out against the light company just such a cause of action as plaintiff would have been required to make out if she had sued the light company for the injury. Clearly this is not the law. The question is whether the plaintiff had received satisfaction from another of a claim for the same wrong—whether the injury to the plaintiff has been satisfied. She should not have two satisfactions. To sustain the rule announced by the instruction, it would be necessary to hold that, although the plaintiff had sued the light company and recovered judgment against it, which judgment had been satisfied, she could then have sued this defendant and recovered another satisfaction if the jury in the second case had found that, notwithstanding the judgment against the light company, it was, as a matter of fact, not liable for the injury, for a judgment against one party is of no binding effect in an action against another. This question is practically determined by what is said in *Miller v. Beck*, 108 Iowa, 575, 582, 79 N.W. 344, 346, where this language is used: 'As we have seen, it is entirely immaterial that the one from whom sat-

> isfaction was demanded and received was not liable for the entire damage. * * * A satisfaction, however, by whomsoever made, if accepted as such, is a bar to further proceedings on the same cause of action.' Whether or not this langugae was *dictum* in the case in which it was used need not now be discussed, for it is, we think, a sound statement of the law."

In *Seither v. Philadelphia Traction Company,* 125 Pa. St. 397, 17 A. 338, 11 Am. St. Rep. 905 (1889), the plaintiff was injured while riding in a car of the Peoples Passenger Railway Company which collided with a car of the defendant Traction Company. Plaintiff sued both companies but settled with the Peoples Company for $6,000.00, dismissing the action against that Company, and plaintiff then sought to recover for her injuries against the defendant Traction Company.

The plaintiff contended that the Peoples Company was not liable and therefore this release should have no affect upon the liability of the defendant Traction Company.

The Court said:

> "The plaintiff had received one satisfaction; he was not entitled to a second. In his suit against the carrying company, the plaintiff could only have recovered a verdict by showing that the collision was caused by its negligence, in other words, that the Peoples Company, and not the Traction Company, was in fault. In the opening sentence of the printed argument in this case we find the following: 'The evidence offered by the plaintiff proves that while riding in a car of the Peoples Company he was injured by a collision due entirely to the negligence of

> the Traction Company, the carrying company and its agents being absolutely without fault. At the time this paragraph was written, the plaintiff had in his pocket the sum of $6,000.00 which he had received from the Company which he now says was 'absolutely without fault.' A case so unique as this might be supposed to stand alone in the books."

In *Leddy v. Barney,* 139 Mass. 394, 2 N.E. 107, the plaintiff made a contention similar to that made in the case at Bar, and the Court stated:

> "The rule that a release of a cause of action to one of several persons liable operates as a release to all, applies to a release given to one against whom a claim is made, although he may not be in fact liable. The validity and effect of a release of a cause of action does not depend on the validity of the cause of action. If a claim is made against one and released, all who may be liable are discharged, whether the one released was liable or not."

In *Young v. Anderson,* 33 Id. 522, 196 P. 193, 50 A.L.R. 1056, the defendant rented a horse and buggy from the plaintiff. The horse and buggy was damaged and the defendant injured when the horse apparently ran away upon the approach of a car belonging to the Boise Valley Traction Company. Plaintiff sued to recover rent for the horse and buggy and for damages while it was in the possession of the defendant. The defendant counter-claimed for injuries alleged to have resulted from a breach of warranty, that the horse was gentle. It appeared during the trial that the defendant had released the Traction Company for injuries received in consideration of $50.00. The Court held that

the Boise Valley Traction Company was not in any sense a joint *tort feasor* and that the release was not a bar to the counter claim of the defendant; but the Court did hold that the payment of the $50.00 was admissible in evidence, and in that connection stated:

> "Since, however, appellant was only entitled to receive compensation for his injuries received, the consideration received from the Boise Valley Traction Company for the release of any claim against it operated to reduce *pro tanto* the amount of any damages he was entitled to recover against any other *tort feasor* responsible for his injuries, and this is true whether the *tort feasors* be joint or independent. The release, therefore, was admissible in evidence."

In *Harris v. City of Roanoke,* 179 Va. 1, 18 S.E. 2d 303 (1942), the plaintiff slipped on a substance on the street and was injured. She demanded compensation from a contractor who was doing work at that point, the owner of the building in front of which plaintiff slipped and the lessees thereof, and the city. She released all but the city for $135.00. Plaintiff in that case asserted that the ones released were not joint *tort feasors* with the defendant city and therefore the city could not be released. The Court over-ruled this contention and stated:

> "It would be highly inequitable for the plaintiff to be heard to assert that the contracting firm and the city were not joint *tort feasors* when her position, in view of the release, has been just the opposite."

In *Cleveland etc. Ry. Co. v. Hilligoss,* 171 Ind. 417, 86 N.E. 485, 131 Am. St. Rep. 258 (1908), the plaintiff

was a motorman of a street car which collided with a railroad car of the defendant The defendant pleaded a release from the street car company, signed by the defendant, releasing the street car company from all claims and demands of the plaintiff arising out of the accident. The plaintiff contended that the pleading setting forth this defense shows that the street car company was not a joint *tort feasor* and was not liable and does not show that a demand was made for damages by the plaintiff against the street car company and therefore this release had no effect upon defendant's liability. In over-ruling this contention, the Court said:

> "With reference to the releasor and releasee, it may be said that the Courts will not permit one suffering a wrong to profit by the fears of those occupying positions subjecting them to the suspicion of being wrong-doers, and who are willing to buy their peace rather than run a risk at law. One who compromises a claim does not necessarily admit that the claim was well founded, but the one who receives the consideration is precluded from denying that it was. So it may be said that when a pretended claim for a tort has been settled by treaty, and satisfaction rendered the claimant by one so connected with the trespass as to be reasonably subject to an action and possible liability as a joint *tort feasor*, the satisfaction rendered will release all who may be liable, whether the one released was liable or not. In such a case it is not necessary that it should appear that the party making the settlement was in fact liable. It will be deemed sufficient if there is an appearance of liability; that is, something in the nature of a claim on the one hand and a possible liability under the rules of law on the other."

Under the rule announced by the latter court, there must be some appearance or possibility of liability on the part of the person paying the injured party before payment by him will affect the liability of others responsible for the injuries. But in the case at bar this requirement is satisfied. Plaintiff filed suit against Lang Company and the other defendants alleging that the negligence of all defendants caused plaintiff's injuries. Lang Company demurred to plaintiff's Amended Complaint (R. 19, 20). This Demurrer was overruled (R. 23). The trial court thereby held that plaintiff had stated a cause of action against Lang Company. This gave an appearance of liability and also indicated a possibility of liability. In fact, there was such appearance and possibility of liability that Lang Company was willing to pay a substantial sum, $1,250.00, to settle the case. On this matter of liability, see the discussion under Point II. of this brief.

Other cases which support this contention of these defendants are *Hubbard v. Railroad Co.*, 173 Mo. 249, 72 S.W. 1073; *Hartigan v. Dickson,* 81 Minn. 284, 83 N.W. 1091.

We submit that under the foregoing authorities the $1,250.00 received by plaintiff from Lang Company must be deducted from the total damages suffered by him, regardless of whether or not the Lang Company was in fact liable for his injuries.

Point II.

THE PLEADINGS AND PROOF IN THIS CASE

SUPPORT THE FINDINGS OF THE TRIAL COURT THAT THE LANG COMPANY WAS NEGLIGENT AND THAT ITS NEGLIGENCE WAS A PROXIMATE CAUSE OF PLAINTIFF'S INJURIES, AND THAT, HENCE, IT WAS A JOINT *TORT FEASOR.*

Plaintiff contends that the Lang Company could not be liable for plaintiff's injuries, and is not a joint *tort feasor,* because of the following reasons:

1. The employees of the Lang Company in loading the truck were acting outside of the scope of their employment and hence Lang Company cannot be held responsible for their acts of commission or omission.

2. That Lang Company or its employees were not negligent.

3. That if Lang Company was negligent, such negligence was not the proximate cause of plaintiff's injuries, because such negligence was only a remote cause and the negligence of the defendant Livestock Company was an intervening cause.

Plaintiff contends that the findings of the trial court, contrary to such contentions, are not supported by the record. The obvious answer to these contentions is that they are absolutely at variance with plaintiff's own pleadings and the court's findings are supported by the admitted or undenied allegations in plaintiff's Amended Complaint.

Plaintiff alleged that Lang Company loaded the truck and placed the wheel between the casings and cab of the truck (R. 13, 14). This the defendants Livestock Company

and Clawsons admitted (R. 25). Under this state of the pleadings the trial court could not find that the employees of Lang Company were not acting within the scope of their employment. It was an admitted fact that Lang Company loaded the truck and placed the wheel thereon as alleged.

It was admitted by the pleadings that the wheel fell from the truck and struck the plaintiff (R. 14, 25).

The plaintiff alleged:

> "That the falling of said wheel was due to the carelessness and negligence of the defendants in this: (a) That the said defendant Lang Company carelessly and negligently failed to fasten said tire or secure the same when it loaded the same onto said truck and carelessly and negligently failed to secure said wheel in any manner whatsoever, then and there well knowing that said wheel, by reason of not being fastened or attached or secured in some manner, would fall from said truck." (R. 14, 15).

The foregoing allegations were not denied by the defendants Livestock Company and the two Clawsons (R. 25).

Hence the negligence of the Lang Company and the fact that such negligence was a proximate cause of plaintiff's injuries was not a controverted issue in the case. These matters were alleged as true by plaintiff and were conceded by the defendants and the trial court found in accordance with those pleadings.

We submit that plaintiff can not now claim that the court's findings are unsupported by the record.

The only case cited by plaintiff which is in any way comparable to the case at bar is the case of *Baughn v. Platt*, 123 Texas 486, 72 S.W. 2d 580. In that case the court stated:

> "In other words, we think it cannot be said that the servant of the Ice Company ought to have anticipated or foreseen that his act would result in plaintiff's injuries."

However, in the case at bar, plaintiff alleged that the defendant Lang Company knew that said wheel, by reason of not being fastened or attached or secured in some manner, would fall from the truck (quotation supra). The trial court so found (Finding No. 4, R. 47).

In the case at bar there are the additional facts that the Lang Company improperly loaded the truck in the first instance and it then became necessary to return and have it reloaded. Certainly from this it is obvious that the truck was to be again taken out on the highway, and in loading the wheel without fastening or securing it in some way, it is reasonable to hold that the person loading it is chargeable with anticipating that the tire would fall from the truck as it proceeded along the highway. That negligence of Lang Company cannot be eliminated as a causative factor in this case. That the negligence of Clawson concurred in plaintiff's injuries does not eliminate this negligence. The negligence of Clawson cannot be classed as unrelated. The tire fell from the truck and where it was not in any way fastened that fall could be anticipated by the loader.

Plaintiff's contention that the negligence of the de-

that the defendants in this case are joint *tort feasors* and that the plaintiff is entitled to judgment for only $1,780.00 against the defendants Livestock Company and the two Clawsons, that amount, plus the $1,250 paid to him by Lang Company being full compensation to him for the damages he has suffered by reason of his injuries.

Respectfully submitted,

ROBERTS & ROBERTS

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